IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

THURSDAY, THE 1ST FEBRUARY 2007 / 12TH MAGHA 1928

CRL.A.No. 1053 of 2002(A)
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SC.97/2000 of ADDL. SESSIONS COURT (ADHOC), THRISSUR
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APPELLANT: ACCUSED
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BABU, S/O. MADATHIL KORAN,
CHATILAMPADAM, KODAKARA, MUKUNDAPURAM TALUK.

BY ADV. SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENTS: COMPLAINANT
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STATE OF KERALA, REPRESENTED BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR ADV. SRI. THOMAS JOHN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**K.P.BALACHANDRAN, J.**
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**CRL.A NO. 1053 OF 2002**
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Dated this the 1st day of January, 2007

**J U D G M E N T**

The accused convicted for offence under Section 58 of the Abkari Act and sentenced thereunder to undergo R.I for a term of one year and to pay a fine of Rs.One lakh and in default to undergo R.I. for a further term of three months is the appellant.

2. The prosecution alleged that at about 5 p.m. on 3.11.98 near the Lift Irrigation Pump House at Vallappadi Desom in Kodakara Village the accused was found in possession of 2 litres of illicit arrack. On submission of the final report, after due investigation, the case was committed to the Sessions Division, Thrissur by the Judicial First Class Magistrate, Irinjalakuda, vide Committal Proceedings No.51/99, after complying with all legal formalities.

3. Pursuant to the appearance of the accused before the Sessions Court, arguments were heard and charge was framed against him for offence under Section 58 of the Abkari Act; was read over and explained to him and he was questioned.

Thereupon, he denied the charge and pleaded not guilty. Prosecution examined Pws 1 to 6, got marked Exhibits P1 to P7 and got identified MO1. On the prosecution, closing their evidence, the appellant was questioned under Section 313 Cr.P.C. Thereupon, he generally denied all incriminating circumstances, appearing in evidence against him and maintained that he is innocent. According to him, he was being lifted from his house during night and no recovery of arrack was effected from his possession.

4. PWs 1 and 4 are the Excise Officials in the detecting team. PW1, the Excise Preventive Officer of the Irinjalakuda Range has given evidence that while they were patrolling in the evening of 3.11.1998, at about 5 p.m., when they reached near the Lift Irrigation Pump House in Vallappady Desom at Kodakara Village in Mukundapuram Taluk, the accused was found carrying a plastic can and coming to the front side of the irrigation pump house from behind the said pump house. He attempted to withdraw on seeing the excise party. Thereupon they intercepted him and questioned him and on examination the contents in the jerry can carried by him was found to be illicit arrack of 2 litre

quantity, on smelling and tasting it. After ascertaining the contents to be illicit arrack they effected arrest of the appellant preparing Ext.P1 arrest memo in that regard with the signature and finger print obtained from the appellant and also took into bandavast 300 ml arrack from the jerry can as sample and sealed it affixing the label. He has identified MO1 as the jerry can and Ext.P2 as the label pasted thereon with the signatures of himself and the appellant. Ext.P3 is the arrest notice given to the wife of the accused and Ext.P4 is the mahazar prepared in relation to the seizure. He has produced the seized article, the sample and the records in connection with the case.

5. In cross-examination, it has been brought out that the road at that portion lies north-south and that on the eastern side of the road is the pump house and behind that is the paddy field. It is also brought out that the pump house was not situated in the paddy field and that it belongs to the irrigation department. Apart from the few questions put to PW1 suggesting that what he has stated regarding the arrest of the appellant and seizure of arrack is not correct, nothing else is brought to disbelieve his testimony.

6. PW4 is the Excise Guard, who has accompanied PW1 in the detection and seizure. He has given evidence corroborating the testimony of PW1. According to him, he has signed in Ext.P4 Mahazar, which is signed also by independent witnesses. He has also identified MO1 jerry can taken into bandavast along with the contents therein. Both PWs 1 and 4 have stated that the hole seen in MO1 jerry can was not there at the time of production in court. Apart from the suggestion to PW4 that the accused was, in fact, not arrested and no sampling was done according to law, nothing has been brought out from the testimony of PW4 as well to disbelieve his testimony.

7. PW6 is the Assistant Excise Inspector of Irinjalakuda Range, who has prepared Ext.P5 occurrence report and registered crime 63/98 against the appellant. He has also proved Ext.P7 chemical analysis report obtained from the Chemical Examiner's Laboratory at Ernakulam. In cross-examination, he has stated that the thondi articles and sample were produced before court the very next day. Those aspects are not under challenge.

8. PW5 is the Excise Inspector of Irinjalakuda, who was there along with the patrolling party, though he has not taken

part in the arrest and seizure. He conducted investigation and submitted final report. Nothing has been brought out from his testimony as well to the benefit of the appellant. Pws 2 and 3 are independent witnesses who have turned hostile though they admitted to have signed in Ext.P4 Seizure Mahazar as witnesses But all the same, PW2 has admitted that he has signed in Ext.P4 near the pump house at Vallappady at five hours in the evening though he has not given the date. No doubt being hostile witness, he took the stand that the appellant was not there at the scene. However, though he stated that he was signing in a blank paper when asked as to whether he was not signing in paper which was already returned up he has stated that he does not remember. PW3 has also stated that he was also signing in Exts.P1 and P4 at five hours in the evening near the pump house while he was going to take bath. He also stated that the accused was not present. He admitted, however, that he is not one who would affix his signature in blank paper. He also stated that he gave signed without ascertaining as to for what purpose his signature was being obtained by the Excise Officials.

9. Thus, on the evidence adduced in the case, there is absolutely no material for the counsel for the appellant to advance any argument assailing the conviction of the appellant for offence under Section 58 of the Abkari Act. All the same, he has advanced contentions that there is no site plan prepared in relation to the scene of occurrence to disable the appellant to set up a proper defence. Site plan is produced usually to enable the court to understand and appreciate the case with reference to the actual scene of occurrence and is not intended to enable the accused to develop a defence. It is not mandatory that the site plan is to be prepared and submitted in all cases. In the instant case,it has to be pointed out that the evidence itself gives a vivid picture of the scene of occurrence, when PWs1 and 4 have given evidence that the road at that portion lies north-south and that the lift irrigation pump house is on the eastern side of the said road and behind the pump house is the paddy field. No purpose will be served by obtaining a site plan showing the above details.

10. It is further contended before me by the learned counsel for the appellant that the accused was not questioned under Section 313 Cr.P.C with reference to Ext.P7 Chemical

Analysis Report and consequently the appellant had no opportunity to state what he had to say with respect to the result of chemical analysis. The argument is so advanced relying on a few unreported decisions of this court in food adulteration cases. The report of Analyst in food adulteration case has no comparison at all with the instant case. The result of Chemical Examination in relation to food items, may give results unfavourable to the accused in those cases, by reason of delay in forwarding the samples, as in the meanwhile, the food samples may get infected or will become date expired and the accused may have to say something as to how he is prejudiced by reason of report of Chemical Analyst so obtained. In the instant case, Pws 1 and 4 have given evidence that by taste and smell, they ascertained that what was being carried by the appellant in MO1 jerry can was illicit arrack. The seizure itself was denied by the appellant when he was questioned under Section 313, Cr.P.C. He has no case that what was carried by him in MO1 jerry can was some other liquid other than arrack. Exhibit.P7 – Chemical Analysis Report only confirmed the prosecution case as what was carried by the appellant in MO1 jerry can was illicit arrack as the sample

contained 33.59% by volume of Ethyl alcohol. Further, it was suggested to the counsel for the appellant that, if he genuinely feels that injustice is done by not affording an opportunity to the appellant to have his say on the Chemical Analyst Report, the appellant can be directed to appear in person before this court and afforded an opportunity to have his say in relation to Ext.P7 Chemical Analyst Report. The said suggestion was not acceptable to the counsel for the appellant. If at all any genuine grievance was there and prejudice is caused to the appellant, by reason of not being questioned with reference to Ext.P7 – Chemical Analyst Report, that is a grievance that can be redressed by questioning him by this court on that aspect. So I do not find any merit in the contention so advanced.

11. In the circumstances, I repel the contentions advanced on behalf of the appellant and confirm the conviction of the appellant entered into by the court below under Section 58 of the Abkari Act. It is finally contended by the learned counsel for the appellant that punishment awarded to the appellant is excessive. I am not prepared to agree for the reason that the punishment awarded is only R.I. for a term of one year when the

imprisonment prescribed by the statute can extend to 10 years. Imposition of fine of Rs. One lakh is only the statutory minimum fine and the court has no power to reduce the said fine.

The appeal, in the circumstances, is devoid of merit and is dismissed.

**K.P. BALANCHANDRAN, JUDGE.**

mma/

**KURIAN JOSEPH, JUDGE**

**OP NO.**

**JUDGMENT**

**21st DECEMBER, 2006**